

11-2332

(& 11-2714)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY
d/b/a AT&T CONNECTICUT,
Plaintiff-Appellant-Cross-Appellee,

v.

CABLEVISION LIGHTPATH-CONNECTICUT, INC., COX CONNECTICUT TELCOM, LLC, AND
COMCAST PHONE OF CONNECTICUT, INC.,
Intervenor-Defendants-Appellees-Cross-Appellants,

METROPCS NEW YORK, LLC, SPRINT COMMUNICATIONS, L.P., SPRINT SPECTRUM, L.P.,
NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC., AND YOUGHIOGHENY
COMMUNICATIONS-NORTHEAST, LLC,
Intervenor-Defendants-Appellees, and

ANTHONY J. PALERMINO, COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC
UTILITY CONTROL; KEVIN M. DELGOBBO, COMMISSIONER, CONNECTICUT DEPARTMENT
OF PUBLIC UTILITY CONTROL; AND JOHN W. BETOSKI, III, COMMISSIONER,
CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT
CASE NO. 3:09-CV-1787(WWE)
HON. WARREN W. EGINTON

**MOTION OF NEUTRAL TANDEM – NEW YORK, LLC FOR LEAVE TO
PARTICIPATE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT-
CROSS-APPELLEE SEEKING REVERSAL OF DISTRICT COURT ORDER**

Richard F. Levy
Matt D. Basil
Kaija K. Hupila
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-8350

Neutral Tandem - New York, LLC (“Neutral Tandem”), by and through its undersigned counsel, hereby moves for leave to participate in these proceedings as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29. In support of this motion, Neutral Tandem states as follows:

1. Plaintiff-Appellant-Cross-Appellee The Southern New England Telephone Company d/b/a AT&T Connecticut (“AT&T”) is appealing a final judgment of the district court entered on May 11, 2011. The district court’s judgment addressed AT&T’s complaint that an October 7, 2009 Decision (“Decision”) issued by Defendants-Appellees, the Commissioners of the Connecticut Department of Public Utility Control (the “DPUC” or the “Department”),¹ is contrary to both federal and state law.

2. The DPUC’s Decision substantially granted a petition brought in 2008 by Intervenor-Defendant-Appellee Youghioheny Communications - Northeast, LLC d/b/a/ Pocket Communications (“Pocket”). Pocket’s petition challenged the rates that AT&T charges for “tandem transit” service in Connecticut. In the Decision, the DPUC ordered AT&T to: (1) reduce its charges for tandem transit service to a regulated rate based on the “Total Element Long-Run Incremental Cost” (or “TELRIC”) methodology; and (2) apply that rate not simply to Pocket,

¹ As of July 1, 2011, the DPUC was renamed the Public Utility Regulatory Authority and aligned under the new state Department of Energy and Environmental Protection. For simplicity and consistency, Neutral Tandem will continue to refer to the agency as the DPUC for this motion and its proposed *amicus* brief.

but to all carriers that purchase tandem transit service from AT&T in Connecticut. (See AT&T's Op. Br., at 3.)

3. The district court affirmed in part and reversed in part the DPUC's Decision, holding that transit service must be provided at TELRIC-based rates but finding that the DPUC erred in forcing AT&T to lower its rates given that there was no evidence AT&T was violating its interconnection agreements with those carriers. (See *id.* at 13.) It is that order from which AT&T now appeals.

4. Multiple carriers provide tandem transit service in competition with AT&T in Connecticut. Neutral Tandem is leading alternative provider of tandem transit services in Connecticut and throughout the United States. Neutral Tandem's customers in Connecticut include many of the carriers that also purchase tandem transit services from AT&T.

5. Because Neutral Tandem is a direct competitor of AT&T, the DPUC's Decision requiring AT&T to reduce its pricing for tandem transit service had a direct impact on the prices Neutral Tandem charges for its services in Connecticut. Specifically, Neutral Tandem has been forced to adopt the rates imposed on AT&T by the DPUC's Decision. Neutral Tandem therefore has a substantial interest in the DPUC's regulation of AT&T's tandem transit rates in Connecticut.

6. Neutral Tandem has participated extensively in the proceedings to date. Neutral Tandem participated in the proceedings at the Department that led to

the issuance of the Decision, including by filing written comments and pre-filed testimony and participating in evidentiary hearings. Neutral Tandem also participated as an *amicus* in support of AT&T in the proceedings before the district court. Consistent with its participation in the proceedings before the Department and district court, Neutral Tandem now seeks leave to participate as *amicus curiae* in support of AT&T's appeal of the district court's order.

7. As required by Federal Rule of Appellate Procedure 29, Neutral Tandem has a substantial interest in the outcome of this matter. Because Neutral Tandem is a direct competitor of AT&T in providing tandem transit services in Connecticut, the below-market, TELRIC-based regulated rates the Department has forced AT&T to charge for tandem transit service directly impact Neutral Tandem's rates. This poses a substantial financial concern for Neutral Tandem, as these regulated rates are artificially low and have been described by the United States Supreme Court as being near confiscatory. *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 489 (2002). Indeed, the financial impact of the DPUC's Decision is likely to be far more severe to Neutral Tandem than to AT&T, because tandem transit service comprises a far greater percentage of Neutral Tandem's business than AT&T's business.

8. As further required by Rule 29, Neutral Tandem's proposed *amicus* brief is both desirable and relevant to the disposition of this case, because Neutral

Tandem has a unique interest that the other parties do not share and cannot adequately represent. The DPUC presumably will defend its Decision and therefore will not be aligned with Neutral Tandem's interests. Similarly, although AT&T is challenging the DPUC's Decision, AT&T is a direct competitor of Neutral Tandem and the incumbent local telephone provider in Connecticut. Neutral Tandem seeks to participate in this Court chiefly to highlight the existence and extent of competition in the market for tandem transit services in Connecticut. AT&T cannot be expected to adequately represent Neutral Tandem's unique interest as its leading competitor in the market to provide tandem transit services in Connecticut.

9. No party opposed Neutral Tandem's participation as *amicus* in proceedings before the district court. Neutral Tandem therefore believes its participation as *amicus* in this Court also should be unopposed.

10. Neutral Tandem's motion and request to participate is timely and compliant with all requirements of Federal Rule of Appellate Procedure 29.

WHEREFORE, for the reasons set forth herein, Neutral Tandem respectfully requests that this Court enter an order granting it leave to participate as *amicus curiae* in this matter, and deeming Neutral Tandem's proposed brief, attached hereto as Exhibit A, to be filed as of the granting of this motion.²

Dated: September 30, 2011

Respectfully submitted,

Neutral Tandem - New York, LLC

By: /s/ Richard F. Levy

Richard F. Levy
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-8350
rlevy@jenner.com

Of counsel:

Matt D. Basil
Kaija K. Hupila
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, IL 60654-3456
(312) 222-8350
mbasil@jenner.com
khupila@jenner.com

² As explained in the Motion of Neutral Tandem – New York, LLC for Leave to File Materials Under Seal, which is being filed herewith, the unredacted version of Neutral Tandem's proposed brief contains confidential information that is subject to a protective order entered by the DPUC. In light of that order, and out of an abundance of caution, Neutral Tandem is only attaching a redacted copy of its proposed brief and will file the unredacted version if and when the Court grants it leave to proceed as *amicus* and file its confidential materials under seal.

CERTIFICATE OF SERVICE

The undersigned, counsel for proposed *amicus curiae* Neutral Tandem – New York, LLC, hereby certifies that a complete copy of the foregoing **Motion of Neutral Tandem – New York, LLC for Leave to Participate as Amicus Curiae in Support of Plaintiff-Appellant-Cross-Appellee Seeking Reversal of District Court Order**, and the attachment thereto, were served by UPS Overnight Delivery to counsel for Appellant and Appellees, listed below.

_____/s/ Richard F. Levy

J. Tyson Covey
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
Tel. 312-782-0600

Gregory Thomas D'Auria
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06106
Tel. 860-808-5027

Clare E. Kindall,
Assistant Attorney General
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, CT 06106
Tel. 860-808-5020

Jeffrey Babbin
Wiggin and Dana LLP
1 Century Tower, 265 Church Street
P.O. Box 1832
New Haven, CT 06508
Tel. 203-498-4400

Bradford Sargent Babbitt
Robinson & Cole LLP
280 Trumbull Street
Hartford, CT 06103
Tel. 860-275-8200

Michael Alan Kurs
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Tel. 860-424-4331

Brad Mondschein
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Tel. 860-424-4319